NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4363-07T2

HERITAGE WOODS HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff-Respondent,

v.

LEONARD A. WISNIEWSKI and
BARBARA A. WRIGHT,

Defendants-Appellants.

Argued September 29, 2008 - Decided February 24, 2009

Before Judges Sapp-Peterson and Alvarez.

On appeal from the Superior Court of New Jersey, Chancery Division, Gloucester County, Docket No. C-55—05.

Anne C. Singer argued the cause for appellants (Jacobs & Singer, attorneys; Ms. Singer, on the brief).

Joseph M. Garemore argued the cause for respondent (Brown & Connery, attorneys; Mr. Garemore, on the brief).

PER CURIAM

Defendants, Leonard A. Wisniewski and Barbara A. Wright, appeal from the trial court decision reaffirming its July 14, 2006 order awarding counsel fees and costs in favor of plaintiff, Heritage Woods Homeowners Association, Inc.

(Association). In an August 16, 2007 per curiam decision, we affirmed the trial court orders directing defendants to remove a recreational gym erected upon common property adjacent to their home, to pay counsel fees and costs incurred by the Association, and to pay fines assessed against them. We remanded the matter for a determination by the trial court as to whether Dennis Pierattini and Mary Shute, individuals serving as the Association's officers and directors, were authorized to commence the litigation on behalf of the Association, and to explain how it arrived at the "particular amount of counsel fees, costs, and fines it awarded." Heritage Woods Homeowners Ass'n, Inc. v. Wisniewski, No. A-5976-05T3 (App. Div. August 16, 2007) (slip op. at 17-18). The Supreme Court denied defendants' petition for certification on December 6, 2007.

On remand, the court permitted the parties to brief the issues and thereafter issued a written opinion. The court found that the minutes of the Association's Board of Trustees (Board) meetings and the election documents left "no doubt that this lawsuit was properly authorized by the Board and the case was brought on behalf of the Association." The court stated further:

> When the initial question of authority was raised in the prior proceedings several years ago, it was at the suggestion of this Court that the Association held a new

election to establish the propriety of the offices of Shute and Pierattini. The results of that election have been a matter of record in this case, and suffice it to say, Shute and Pierattini were elected unanimously by the Association to act as directors. The Association's minutes demonstrate a clear corporate intention to institute and fully prosecute this action. Other than by the Defendants, there was never any challenge to these issues by any other members of the Association. Nor is there any evidence of intra-corporate dispute about the institution of this lawsuit. Mr. Pierattini's Certification filed on December 14, 2007, contains attachments A through D. This case was instituted by the Association by way of a Verified Complaint filed by the Association on July 26, 2005. Mr. Pierattini attaches a Resolution of the 2000 Board of Directors which is signed on October 6, 2005. That Resolution attempts to back-date the authority to the year 2000. It indicates that Mary Shute, Dennis Pierattini and David O'Rourke were the duly elected voting members of the Association on February 24, 2000. Also attached to his Certification is a copy of a Resolution of the 2006 Board of Directors which ratifies the action of all the prior directors.

From a practical standpoint, were there any question of the authority of Ms. Shute and Mr. Pierattini regarding their actions on behalf of the Association, there was not only the election subsequent to the institution of the action which ratified their positions, but the prior Resolutions as indicated in Mr. Pierattini's Certifications that they were acting on behalf of the Association. In his Certification, Mr. Pierattini indicates that between 2001 and February 2007, there had never been a contested election.

> In summary, there is no indication that there is any dispute in or among the members of the Association as to the authority of Shute and Pierattini to act on their behalf.

The court next addressed the issue of fines, counsel fees and costs. The court stated that the "fines were assessed against Defendants in the amount of $100.00 per day, not pursuant to the rules and regulations of the Association, but in order to enforce this Court's Order which had been ignored for several months, i.e., to remove the personal property from the common area." The court determined that it had the inherent power to enforce its orders, noting that "[f]or an orderly functioning of society, court orders must either be voluntarily complied with or appropriately enforced." We find no error in the court's imposition of fines under these circumstances.

Turning to the issue of counsel fees and costs, the court stated that it analyzed the certification submitted in support of the award in detail. The court noted that defendants claimed that "[p]aintiff was 'not entitled' to fees, fines or costs and the only reasons given for that position were factual allegations that the Township municipal court determined that there were no violations of law." While acknowledging that defendants claimed the fees were excessive, the court found that defendants failed to specifically point to any service provided or hourly rates charged that were excessive. The court found

that the issues before it in the underlying litigation were "of significant complexity." The court concluded that the fees charged and fines assessed were appropriate, including those counsel fees and costs incurred in connection with the appeal, in accordance with our remand order.

On appeal, defendants raise the following points for our consideration:

> POINT I
> NEITHER PIERATTINI NOR SHUTE WERE PROPERLY ELECTED OFFICERS OF THE ASSOCIATION WHEN THEY FILED THIS LAWSUIT AND SO THEY HAD NO AUTHORITY TO SUE ON BEHALF OF THE ASSOCIATION; LATER RATIFICATION CANNOT CREATE SUCH AUTHORITY.
>
> A. THE 2005 HERITAGE WOODS BOARD WAS NOT DULY ELECTED AND SO COULD NOT AUTHORIZE FILING THIS LAWSUIT ON BEHALF OF THE ASSOCIATION.
>
> B. RATIFICATION CANNOT LEGITIMIZE THE ACTIONS OF AN ILLEGITIMATE BOARD OF DIRECTORS WHERE THOSE ACTS DIMINISH THE RIGHTS OF THIRD PARTIES.
>
> POINT II
> THE AWARD OF COUNSEL FEES AND COSTS WAS IMPROPER BECAUSE THE PARTIES' CONTRACT DID NOT PERMIT FEE-SHIFTING IN THIS TYPE OF LAWSUIT.
>
> POINT III
> THE COUNSEL FEES, COSTS AND FINES IMPOSED WERE: (a) UNREASONABLE; AND (b) WERE IMPOSED WITH INSUFFICIENT FINDINGS, CONTRARY TO THIS COURT'S DIRECTION IN ITS EARLIER OPINION.

A. THE AWARD OF COUNSEL FEES AND COSTS.

B. THE AWARD OF A FINE.

POINT IV

THE COURT ERRED IN ORDERING THAT PLAINTIFF MAY EXECUTE IMMEDIATELY ON DEFENDANTS' HOUSE RATHER THAN SEEKING FIRST TO EXECUTE ON PERSONAL PROPERTY.

We have considered the arguments advanced in light of the record and applicable legal principles and conclude that they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons set forth in Judge James E. Rafferty's April 10, 2008 letter opinion. We add the following brief comments.

The defendants contend that counsel fees are only recoverable as an assessment and this was not an assessment. This particular argument was not raised in the previous appeal but was first raised before the trial court on remand. The sole basis for reversal of the counsel fee award before us in the earlier appeal was defendants' claim that the counsel fee award was excessive. Because defendants failed to raise this argument before us until now, we may decline to address it. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (noting appellate courts generally decline issues not raised below unless they concern jurisdiction or questions of great public interest); see also Murin v. Frapaul Constr. Co., 240 N.J.

Super. 600, 613 (App. Div. 1990). Nonetheless, we elect to reach this issue as we find no prejudice to plaintiff. Defendants' contention does not require consideration of any matters outside of the record, and addressing it now is no more burdensome than addressing it in the prior appeal would have been. See Cornblatt v. Barow, 153 N.J. 218, 230-31 (1998).

On the return date of plaintiff's original application for counsel fees, plaintiff argued before the trial court that assessments had been charged against defendants for their failure to comply with the court's October 31, 2005 order directing them to remove the recreational gym and, as such, it was entitled to recover counsel fees. Plaintiff cited, among other provisions, Article III, Section 8 of the Declaration of Covenants, Restrictions, Easements, Charges and Liens (Declaration) dealing with assessments, which plaintiff proposed as one of the bases upon which fees could be recovered. Plaintiff also argued that it was entitled to recover fees pursuant to Article XII of the By-Laws of Heritage Woods Homeowners Association, Inc. (By-Laws). The trial court found that under the By-Laws, plaintiff's proposal to charge the fines, fees and costs against defendants as an assessment was proper:

> A review of the Motion for Fines, Fees and Costs requires that the motion be granted

> and that fines, fees and costs be assessed as proposed by the Plaintiff. The by-laws of the association allow for fines, fees and costs. The Court has reviewed the Appellate Division case of [Comm.] for a Better Twin Rivers v. Twin Rivers Homeowners Association, 383 N.J. Super. 22 [(App. Div.), cert. granted, 186 N.J. 608] (2006). It can be gleaned from that decision that the primary concern in actions taken by homeowners associations is due process to the defendants. In this case, none of the Defendants' rights were inappropriately dealt with. Sufficient notice was given regarding the position of the homeowners association as well as sufficient efforts being made to resolve the situation amicably. In light of all the facts and circumstances set forth on the record and in the moving papers of the Plaintiff, the application for fines, fees and costs shall be granted.

In our August 16, 2007 decision, we noted that plaintiff sought counsel fees both pursuant to its By-Laws and Declaration, and specifically noted plaintiff's reliance upon Article III, Section 8. Heritage, supra, slip op at 16. We, however, found that fees were warranted pursuant to the Declaration, which by its terms incorporated the By-Laws, rather than by specific reference to a particular section of the Declaration or By-Laws. We are satisfied that the fees were recoverable under Article III, Section 8, as assessments as proposed by the Association and additionally under the Association's By-laws, Article XII. Article XII of the By-Laws provides in pertinent part that the Association "shall have the

power, at its sole option, to enforce the terms of [its by-laws] . . . charging the breaching party with the entire cost or any part thereof[.]" (emphasis added). Defendants' erection and then continued refusal to remove the recreational gym from the Association's common property violated the Association's Declaration and By-Laws, resulting in enforcement action, which it was authorized to do under both the Declaration and the By-Laws. We are persuaded that the language "entire cost" includes recovery of counsel fees incurred in any enforcement action.

The trial court's award of counsel fees, costs, and fines is reviewed under an abuse of discretion standard. Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003) (citing Smith v. Wade, 461 U.S. 30, 52, 103 S. Ct. 1625, 1638, 75 L. Ed. 2d 632, 648-49 (1983)). Hence, a trial court's award of counsel fees will only be disturbed on appeal upon a finding of a clear abuse of discretion, Packard - Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001), and in the "rarest of occasions[.]" Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

Upon remand, the trial court articulated its reasons for the award. It noted its detailed review of the certification submitted in support of the fees sought and the billing invoices submitted. It also observed defendants' failure to advance any specific challenge to the nature of the services provided or the

hourly rate charged, either at the time plaintiff initially sought a counsel fee award or during the remand proceedings. Finally, the court noted that the issues over which it presided were significantly complex. We are satisfied that the court did not abuse its discretion when it determined that "all the legal services . . . are appropriately recoverable by the Association."

In summary, we are satisfied the trial court's statement of reasons amplifies the basis for arriving at the counsel fees and costs awarded and fines imposed. We discern no clear abuse of discretion. Packard - Bemberger & Co., supra, 167 N.J. at 444.

Finally, plaintiff contends the trial court erred in ordering that plaintiff "may now proceed to sell the real estate commonly known as 140 Azalea Drive." Defendants contend the court entered this order without making any findings to justify its decision. We disagree.

This language is merely a repetition of the language contained in the court's December 19, 2006 order that is incorporated into the April 8, 2008 order. The December 19, 2006 order was issued after the court found that defendants had willfully failed to comply with the court's "orders dated August 17, 2006 and November 6, 2006 compelling them to appear at depositions and produce enumerated documents."

Defendants did not seek reconsideration of the decision, nor did defendants file an appeal. Prior to the issuance of our opinion, the Supreme Court granted a stay of the sheriff's sale conditioned upon the grant of certification. Our decision was issued on August 16, 2007. Defendants petitioned the Court for certification, which the Court denied on December 6, 2007, the effect of which lifted the stay. Because no appeal was taken from the December 19, 2006 order, defendants may not now seek to challenge the basis of that order merely because it was again referenced and incorporated in the April 8, 2008 order.

Affirmed.